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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1979

No. 79-602

DONALD W. AGINS and BONNIE G. AGINS,
Appellants,

vs.

CITY OF TIBURON,
Appellee.

Appeal From the Supreme Court of California.

MOTION TO DISMISS OR AFFIRM

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MOTION TO DISMISS OR AFFIRM

Appellee, City of Tiburon,[1] respectfully moves to dismiss the appeal on the ground that it does not present a substantial federal question, or alternatively to affirm the judgment of the California Supreme Court on the ground that the questions on which the decision of the cause depends are so unsubstantial as to not need further argument. Rule 16(1)(b) and (c).

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[1]Tiburon has recently changed its name from "City of Tiburon" to "Town of Tiburon". For convenience the word "City" is used herein.

QUESTIONS PRESENTED

1. Has a state court reached a proper conclusion when it upholds the constitutionality of a zoning ordinance as enacted when the landowner has not sought approval from the local agency and when the zoning ordinance does not foreclose reasonable use of the land?

2. Has a state court reached a proper conclusion where it states that a landowner may seek judicial invalidation of an unconstitutional zoning ordinance but may not seek compensation under a theory of inverse condemnation?

3. Has a state court reached a proper conclusion when it finds under the facts as alleged, and as supplemented by facts subject to judicial notice, that a cause of action for inequitable precondemnation activities sufficient to constitute inverse condemnation has not been alleged?

STATEMENT OF FACTS

In 1973 the City of Tiburon adopted widespread and comprehensive zoning modifications (Ordinances 123NS and 124NS) which had the effect of placing large areas of the City (a small portion of which included appellants' five acres of undeveloped land) in the RPD-1 zone.[2] As so

[2]The brief filed by amicus on behalf of the National Association of Home Builders states (page 17) that *Agins* involves "rezoning of the property to a lower density;" and, appellants state that Ordinance 123NS "created restrictive zoning . . ." Juris. St. p. 8. The complaint nowhere alleges, however, what the prior zoning was; nor does it allege that the property was down-zoned; nor does it allege, or set forth facts which indicate how, or in what manner, the modified zoning regulations are more restrictive than those that previously existed (if, indeed, such is their contention).

As is apparent from the ordinance, one of the primary functions of the RPD-1 zone is to permit flexibility and deviation from traditional subdivision by permitting developers, through the vehicle of a master plan, to cluster the homesites. Clustering serves two very worthwhile purposes, to wit, (1) it allows the developer to build more economically (particularly on hillsides) by concentrating density in areas suited for development and at the same time (2) reduces cutting and grading and leaves more of the land in its open natural state. Where slope stability is poor [as Ordinance 124NS points out, "Much of the area is excessively steep and slope stability ranges from good to poor". Juris. St. App. p. 43], the value of the land is generally increased where clustering is permitted.

zoned, appellants were entitled to use their property for residential purposes as a matter of right. This, they concede in their complaint, is the highest and best use of the land and, in fact, the very purpose for which they acquired it. Notwithstanding the above, appellants have never, at any time, for any reason, made application of any kind to use, or improve, their property, for any purpose whatsoever.[3]

[3]"A party aggrieved by the application of a statute or ordinance must invoke and exhaust the administrative remedies provided thereby before he may resort to the courts for relief." *Metcalf v. Co. of Los Angeles* (1944), 24 Cal.2d 267, 269. "Administrative remedies must be exhausted even when the constitutionality of the basic legislation is challenged." *Aircraft & Diesel Equipt. v. Hirsch* (1947), 331 U.S. 752. *Pan Pacific Properties, Inc. v. Co. of Santa Cruz* (1978), 81 Cal.App.3d 244. The reason for the rule could not be better illustrated than by appellants' offer, contained in their brief filed with the California Supreme Court, to settle in exchange for an assurance of five homesites (a result that is, at least potentially, available on the administrative level).

Appellants complain that the California Supreme Court "ignored the allegations that, *as applied*, the Ordinance was confiscatory, and looked instead to the face of the Ordinance." Juris. St. p. 9. And, they argue, the high state court should have conducted a "factual inquiry" before ruling on Constitutionality. Juris. St. p. 4, ¶ 3. These contentions overlook the fact that a decision, and factual inquiry, as to whether the ordinance is constitutional *as applied* must first await action on an application for development. For, until they seek and have been denied there is no "actual controversy". *State of California v. Superior Court [Veta]* (1974) 12 Cal.3d 237. The issue before the California court was whether the Ordinance was constitutional on its face; there can be no question but that it is. "Unless the complaining party *pleads facts* to show that the ordinance is unreasonable as a *matter of law*, a Court will not presume the invalidity of a zoning ordinance . . . or consider the substitution of its judgment on zoning for that of the public authority." *Morse v. Co. of San Luis Obispo* (1967) 247 Cal.App.2d 600, 603 (emphasis added). And, see extended discussion text, *infra*.

Instead, and in lieu, of submitting an application and plans for residential development, appellants filed suit against the City wherein they alleged that the mere enactment of Ordinance 124NS "forever prevented the development [of the land] for residential use or otherwise"; "completely destroyed [its value] for any purpose or use whatsoever"; and "prevent[ed] any sale, use, transfer or development thereof . . .".[4]

In their first cause of action appellants claimed damages of 2 million dollars for inverse condemnation and in a second cause of action they sought a declaration that the ordinance was unconstitutional. The California Supreme Court affirmed the trial court's dismissal of both causes of action.[5]

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[4]Other than these broad conclusionary assertions, there are no facts set forth in the complaint which explain how, or why, the ordinance destroyed the value of appellants' property. "Although appellants allege that the zoning ordinance constitutes 'acquisition for public use' they present no allegations of fact indicating either acquisition or public use. They have failed to set out facts in their complaint to show that the ordinance was a property-taking device rather than a regulation of the use of land" *Pinheiro v. Co. of Marin* (1976) 60 Cal.App.3d 323, 328. The ordinances enacted by the City, and here under consideration, contemplate no public use of appellants' property whatsoever.

[5]Tiburon is one of the smaller cities in California (Juris. St. p. 5) and, as such, its staff is neither large enough nor does it have the technical expertise to carry out the numerous and complex state mandated planning programs. If compliance is to be had, cities such as Tiburon have no alternative but to retain outside expert consultants to advise and consult with them. Juris. St. App. p. 2. As these consultants are independent contractors the employing public agency has no advance knowledge of, or authority to censor or control, such of their opinions, conclusions and recommendations as may be set forth in their reports filed with the City. The Dean Witter (Witter) and Williams & Mocine (Williams) reports referred to at page 7 of the Jurisdictional Statement are simply two (of many) such private advisory reports filed with the City.

In an apparent attempt to plead around a general demurrer, appellants alleged in their complaint that Ordinance 124NS ". . . in-

ARGUMENT

The Issues Actually Resolved By the Lower Court Are Much More Limited Than Portrayed By Appellants and Do Not Present Significant Questions Worthy of This Court's Attention

This case can be summarized as follows: the appellants are entitled as a matter of *right*, under a newly enacted zoning ordinance of the City of Tiburon, to use their five acres of land for one residential home; on application by the appellants, up to four additional homes may be approved by the city for a possible total of five homes on the five acres. (See Juris. St. App., p. 3) However, appellants have not applied to the city for any permit whatsoever and yet have alleged that their property has been

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corporated by reference all of the terms and provisions of both [the Witter and Williams reports] . . . was based thereon and limited in every respect to the terms thereof and completely restricted to the mandates therein expressed." As their theory of inverse was, clearly, bottomed upon the allegation that, ". . . the natural and proximate result of said Ordinance was [because of the allegation that it incorporated the Witter and Williams reports] to prevent any sale, use, transfer or development [of their property] or any part thereof" and, in view of the fact that these allegations were untrue, the trial court was requested to take judicial notice of Ordinance 124NS (allegations contrary to facts of which a court may take judicial notice are not deemed admitted for purposes of ruling on a demurrer. *Holmes v. City of Oakland* (1968) 260 Cal.App.2d 378, 382). Ordinance 124NS does not incorporate the Witter and Williams reports, by reference or otherwise; nor does it mention them in any manner whatsoever, directly or indirectly (Juris St. App. pp. 41-46).

As noted by the California Supreme Court (Juris St. App. p. 2) the "Financing Plan" and the "Open Space Plan" referred to at page 7 of the Jurisdictional Statement are, simply, "advisory reports;" and they were not adopted by the City by Ordinance 124NS, or otherwise. As further noted by the Court, the Resolution approving the sale of the bonds (Juris. St. p. 7) did not specifically authorize acquisition of appellant's property or directly refer to it (Juris St. App. p. 3). [If, as appellants claim, their property is worth two million dollars, it is apparent that if the City had attempted to purchase not only would the bond money of $1.5 million have been exhausted, but the City would have been left $500,000 in debt].

rendered useless by action of the city. To avoid the rather obvious conclusion that their property can be put to a reasonable use, appellants point to the activities of the city leading to the filing of an action in eminent domain. But that litigation was abandoned by the city according to statutory procedures culminating in a court order which has long since become final.

In this setting appellants present this case as if it raised a broad variety of issues. In fact, however, many of the issues raised by the jurisdictional statement are not raised by the pleadings and were not argued by the appellants below.[6] It therefore seems appropriate to point out precisely what the California Supreme Court did hold, as well as to point out what issues are not involved in this case. These latter issues are not properly before this Court. *Cardinale v. Louisiana* (1968) 394 U.S. 437.

Initially, the high State Court recited the general principle that a zoning ordinance may be unconstitutional and therefore invalid when its effect is to deprive the owner of substantially all reasonable use of the subject property. Applying this general principle the Court held that the ordinance involved did not have that effect since it allows appellants to construct from one to five residences on their property. (Juris. St. App., p. 13). Furthermore, the Court held that the proper remedy for challenging an unconstitutional regulation is an action in the nature of mandamus

[6]Some of the broad array of issues appellants now seek to raise were first presented in appellants' petition for rehearing before the California Supreme Court and in the briefs of some of their supporting amici. Thus, it was not until after the opinion of the California Supreme Court that appellants saw fit to expand their perception of this case.

or declaratory relief and not inverse condemnation. (See generally, Juris. St. App., pp. 5-12). Finally, the Court held that the so-called "pre-condemnation activities" of the city did not give rise to an action for damages. (See generally, Juris. St. App., pp. 13-15).

This case does not present the following issues:

(1) Failure of the City of Tiburon to provide for low and moderate income housing by any means including exclusionary zoning.[7]

Such issues were not raised below, either in the pleadings or in the arguments presented. In any event, the California Supreme Court has addressed itself to the legal principles applicable to local actions which may have unfavorable regional impacts. *Associated Homebuilders etc., Inc. v. City of Livermore* (1976) 18 Cal.3d 582.

(2) The case does not involve a situation where a plethora of permits are required from numerous local agencies, special districts, regional agencies, state agencies and federal agencies. See Juris. St., pp. 13-15).[8] The pleadings in this case speak only to actions of the City of

[7]The Court's attention is invited to *Winkelman v. City of Tiburon* (1973) 32 Cal.App.3d 834, which appellants observe to involve "ingenious tokenism". (Juris. St. p. 17, fn. 13). No "ingenious tokenism" is evident in that case, whatever that term may mean. It is respectfully requested that the gratuitous observations about Marin County in that footnote be disregarded as irrelevant. In fact in *Winkelman* it is revealed that a public housing project existed on the subject property and that the city's efforts to provide new dwelling units for people of low and moderate income were proposed and upheld by the Court.

[8]In this regard the examples cited in the Jurisdictional Statement at p. 13, fn. 8 are irrelevant. Further, one of them, the reference to the Walt Disney Project, deals with a proposal which would have been located entirely on federal lands. See *Sierra Club v. Morton* (1971) 405 U.S. 727.

Tiburon, nothing more. Nowhere below was it suggested that under the facts as alleged there are any federal constitutional issues raised by requirements that appellants obtain multiple permits from several layers of public agencies.

(3) This case does not involve abuse by government agencies in continually adjusting their positions following adverse court decisions against them with the intent of continuing to frustrate an owner in accomplishing any reasonable use of land. (See Juris. St., pp. 28-29). The appellants have never applied to the city and thus the city has never even had the opportunity to indicate what number of homes it might approve on appellants' parcel.

(4) The case does not present a claim under 42 U.S.C. section 1983. (See Juris. St., pp. 25-27). Such a cause of action was neither pled nor argued in the lower courts.

The California Supreme Court's Conclusion That Appellants' Land May Be Put To a Reasonable Use Under the City's Zoning Ordinance Is An Application of Established Constitutional Doctrine and Is Not Novel In Any Respect

In *Penn Central Transportation Co. v. City of New York* (1978) 438 U.S. 104, this Court concluded that New York City's denial of Penn Central's request to build a multistory office tower above Grand Central Terminal did not result in a "taking" of the railroad's property. In so holding this Court observed that Penn Central was capable of earning a reasonable rate of return on its investment and that the potential use of the air rights above the terminal, either through approval of a smaller office building or by

transfer of development rights to another parcel, mitigated the financial burdens of the city's historic landmark regulations. On these facts the Court concluded that:

> "The restrictions imposed are substantially related to the promotion of the general welfare and not only permit reasonable beneficial use of the landmark site but afford appellants opportunities further to enhance not only the Terminal site proper but also other properties." *Id.*, p. 138.

The holding of the California Supreme Court that appellants have available to them a reasonable use of their property (thereby overcoming any claim of unconstitutionality or "taking") precisely follows the principles utilized by this Court's decision in *Penn Central*. See also, *Euclid v. Ambler Realty Co.* (1926) 272 U.S. 365.

Penn Central is further instructive in response to appellants' claim that the California Court mistakenly refused to allow appellants to show that as the ordinance applies to their property, they could make no economically viable use. In *Penn Central* this court stated:

> "While the Commission's actions in denying applications to construct an office building in excess of fifty (50) stories above the Terminal may indicate that it will refuse to issue a certificate of appropriateness for any comparably sized structure, nothing the Commission has said or done suggests any intention to prohibit *any* construction above the Terminal. The Commission's report emphasized that whether any construction would be allowed depended upon whether the proposed addition 'would harmonize in scale, material, and character with [the Terminal].' (citation omitted) Since appellants have not sought approval

for the construction of a smaller structure, we do not know that appellants will be denied any use of the air space above the Terminal." *Id.*, pp. 136-7.

Thus, this Court refused to "apply" the ordinance to the Terminal site because it refused to assume that denial of a particular proposed structure would encompass within it projected denials of all future applications for any use whatsoever on the site. The instant case presents an even stronger reason for the same approach since appellants have not even approached the city for any permits. The propriety of the lower Court's refusal to deal with how the ordinance might apply to appellants' property in the absence of any administrative action by the city is thus amply supported.[9]

Appellants urge that constitutional principles in the area of land use regulation are so uncertain as to preclude predictability. (Juris. St., pp. 12 (fn. 7), 15-16.) Appellants' real difficulty is the lack of authority supporting their essential theme that excessive land use regulation requires compensation. Even an authority cited by appellants as a "widely acknowledged national authority on land use law" (Juris. St., p. 15 fn. 9) has been unable to cite any federal appellate case which sustains a constitutionally required award of damages based soley on excessive land use regulation. See Hagman and Misczynski, *Windfalls for Wipeouts* (1978) pp. 256-307. Furthermore, while this Court has recognized that it is difficult to come

[9]The propriety of utilizing available administrative procedures to eliminate or clarify issues prior to their presentation to a court has been recognized in other contexts. See, e.g., *California Comm'n v. United States* (1957) 355 U.S. 534, 539; *Allen v. Grand Cent. Aircraft Co.* (1954) 347 U.S. 535, 553; dissent of Chief Justice Burger in *Moore v. East Cleveland* (1976) 431 U.S. 494, 521.

up with easy formulas for resolving these kinds of cases (*Penn Central Transportation Co. v. City of New York, supra,* at p. 124) there is substantial predictability which renders many, if not most, fact situations subject to a predictable legal result. Thus, the general principle followed by the Court below is that land subject to regulation must remain capable of providing some economic benefit to its owners.[10] See, e.g., *Penn Central Transportation Co. v. City of New York, supra,* at pp. 137-8, *Hass Co. v. City and County of San Francisco* (9th Cir. Oct. 4, 1979) ..... F2d ..... (No. 77-2486), *South Terminal Corp. v. Environmental Protection Agcy.* (1st Cir., 1974) 504 F2d 646, 678, *Fred F. French Investing Co. v. City of New York* (1976) 385 N.Y.S. 2d 5, appeal dism'd., 429 U.S. 990. That principle was fairly applied in this case.

In sum then, the independent and alternative ground of the lower Court's opinion (the ordinance is constitutional and does not constitute a "taking" of appellants' property) is completely consistent with established doctrines of constitutional law and with the usual rules requiring available administrative procedures to be invoked prior to seeking judicial review regarding how an ordinance might be applied to specific property. It is respectfully submitted that this case does not present substantial or novel issues which warrant the attention of this Court. In fact, contrary to appellants' assertion (Juris. St., p. 30), they have had their day in court and the resolution of the issues they raised was in accordance with long established precedent.

[10]This Court's recent decision in *Andrus v. Allard* (November 27, 1979) ..... U.S. ....., 40 CCH S.Ct. Bull. B163, strongly supports the city's position. Thus the Court held, *inter alia:* "In the instant case it is not clear that appellees will be unable to derive economic benefits from the artifacts; for example, they might exhibit the

A Land Use Regulation Which Violates Substantive Due Process Requirements Is Invalid; There Is No Additional Constitutional Requirement That Affected Property Owners Be Awarded Compensation

The conclusion of the California Supreme Court that a landowner may challenge the constitutionality of a land use action by declaratory relief or mandamus but not through inverse condemnation is also a proper result and is not novel. Other states have previously reached this conclusion. In *Fred F. French Investing Co. v. City of New York* (1976) 385 N.Y.S. 2d 5, Appeal dism'd., 429 U.S. 990, the New York Court of Appeals stated:

> "As noted above, when the State 'takes', that is appropriates, private property for public use, just compensation must be paid. In contrast, when there is only regulation of the uses of private property, no compensation need be paid. Of course, and this is often the beginning of confusion, a purported 'regulation' may impose so onerous a burden on the property regulated that it has, in effect, deprived the owner of the reasonable income productive or other private use of his property and thus has destroyed its economic value. In all but exceptional cases, nevertheless, such a regulation does not constitute a 'taking', and is therefore not compensable, but amounts to a deprivation or frustration of property rights without due process of law and is therefore invalid." *Id.*, p. 8.

Thus, a requirement of just compensation in connection with constitutionally invalid land use actions was expressly rejected. Other New York decisions have followed the same

artifacts for an admissions charge. At any rate loss of future profits —unaccompanied by any physical property restrictions—provides a slender reed upon which to rest a takings claim." *Id.*, p. 179. In the instant case a more substantial and traditional use is allowed as a matter of right under the zoning regulation.

principle. See, e.g., *Charles v. Diamond* (1977) 392 N.Y.S. 2d 594; *Jensen v. City of New York* (1977) 42 NY2d 1079.[11] See also, *DeMello v. Town of Plainville* (Conn. 1976) 368 A.2d 71; *Gold Run Limited Ltd. v. Board of County Com'r* (Colo. 1976) 554 P.2d 317; *Davis v. Pima County* (Ariz. 1978) 590 P.2d 459 *cert. denied* (1979) 39 CCH 3178; *Eck v. City of Bismarck* (N.D. 1979) 283 N.W.2d 193.

The remedy of judicial invalidation of unconstitutional land use regulation strikes the appropriate balance between the interest of the public in receiving the benefit of regulations adopted by their representatives and private property rights which are protected by federal and state constitutions. The average member of a local governing body, elected by the people of a particular jurisdiction, is unlikely to support non-traditional or innovative land use actions which are arguably necessary in that community if there is any substantial risk that a court would subsequently determine that the affected properties had been "taken" thereby stating a claim for money damages in inverse condemnation. Under the invalidation approach local governing bodies can undertake such actions without being subject to the penalty of having inadvertently opened up the public treasury if they guessed wrong as to the constitutional line between valid regulations and compensable "takings". The constitutional rights of property owners are protected by their right to have unconstitutional land use actions invalidated by judicial action.

[11]The New York Court of Appeals followed this approach in its decision in *Penn Central Transportation Co. v. City of New York* (1977) 397 N.Y.S. 2d 914, which was subsequently reviewed by this Court. This Court was aware of the New York rule. *Penn Central Transportation Co. v. City of New York,* supra, pp. 120-121.

In this Court's decision in *Penn Central Transportation Co. v. City of New York, supra,* it was stated:

> "Indeed, we have frequently observed that whether a particular restriction *will be rendered invalid* by the government's failure to pay for any losses approximately caused by it depends largely 'upon the particular circumstances [in that] case'." *Id.,* p. 124. (Emphasis added).

This language appears in the introductory portions of the discussion concerning previous decisions of the Court on the subject of land use regulation. It is certainly not contended that *Penn Central* firmly resolved that invalidation is the remedy for an unconstitutional land use regulation, since the opinion did not reach that issue. However, the language does indicate, contrary to appellants' assertion, that the courts have traditionally approached land use restrictions from the standpoint of whether they are valid or invalid under constitutional standards.

Appellants would reverse this traditional approach. Instead, they assume that the law has required payment of just compensation where land use actions exceed constitutional boundaries. Thus, appellants assume that the courts have looked for a demarcation between permissible regulation and "unconstitutional taking requiring payment of just compensation". (Juris. St., p. 12). However, none of the three cases cited immediately following this statement ordered compensation to be paid. *Penn Central Transportation Co., supra; Goldblatt v. Town of Hempstead* (1962) 369 U.S. 590; *U.S. v. Central Eureka Mining Co.* (1958) 357 U.S. 155. In 1973, at the request of the Council on Environmental Quality (42 U.S.C. 4342)

Bossleman, Callies and Banta produced *The Taking Issue* (Council on Environmental Quality, 1973) as a study on the constitutional limits of governmental authority to regulate privately held land without payment of compensation. One of its conclusions illustrates appellants' error:

> " 'The myth' of the taking clause has always lured landowners to expect more from it than prior precedents really justify." *Id.* p. 232.[12]

In the same vein, appellants' vision of chaos and inequity as between California case law and cases from the federal courts and the courts of other jurisdictions is unfounded. The concepts and cases relied upon by appellants have little relevance to the decision of the lower Court in the instant case.

Typical of appellants' approach is their reliance on *Lake Country Estates v. Tahoe Regional Planning Agency* (1979) 99 Sup. Ct. 1171. Appellants assert that *Lake Country Estates* indicates that this Court, as well as lower federal courts, will entertain property owners' pleas for "monetary relief in the form of constitutionally promised just compensation." (Juris. St., pp. 25-26). In fact, insofar as relevant, *Lake Country Estates* held that a claim under the Civil Rights Act (42 U.S.C. § 1983) could be stated against the Tahoe Regional Planning Agency and its governing body members. This Court was not called upon and did not decide what remedies might be

[12]See also "Agins: A Step in the Right Direction" (Land Use Law and Zoning Digest, September 1979.).

appropriate under such a claim.[13] Of course, as previously pointed out, no claim has been asserted or argued under the Civil Rights Act in the instant case. Furthermore, there is nothing in the opinion of this Court in *Lake Country Estates* which indicates that inverse condemnation is constitutionally the only required remedy for excess land use regulation.

The history of the case reveals the opposite to be true. Lake Country Estates was one of four property owners involved in the consolidated opinion of the Ninth Circuit in *Jacobson v. Tahoe Regional Planning Agcy.* (9th Cir. 1977) 566 F.2d 1353. The Ninth Circuit, *inter alia*, rejected a cause of action for inverse condemnation. *Jacobson*, *supra*, at pp. 1358-59. While Lake Country Estates sought and received review by this Court, the propriety of the holding of the Ninth Circuit regarding inverse condemnation was not raised in the petition for certiorari and the decision did not deal with inverse condemnation. Finally, it should be noted, that in *Jacobson* the Ninth Circuit did hold that a claim had been stated under the due process clause and that the particular ordinance in issue could be reviewed to determine its validity. *Jacobson, supra,* at p. 1359, particularly, fn. 9. The opinion of this Court in *Lake Country Estates* acknowledged and did not alter this

[13]In fact, on remand in one of the cases consolidated for purposes of appeal in *Lake Country Estates* the Federal District Court ruled that money damages would be inappropriate in that action. *Jacobson v. Tahoe Regional Planning Agency,* United States District Court for the District of Nevada, Civil No. R-2947 BRT (Order Dismissing Second Amended Complaint, August 9, 1979). Money damages pursuant to claims under 42 U.S.C. section 1983 for "taking" may, however, be appropriate under some limited circumstances. *Monell v. New York City Dept. of Social Services* (1977) 436 U.S. 658, 687.

holding of the Ninth Circuit. See *Lake Country Estates v. Tahoe Regional Planning Agcy., supra,* at p. 1175. This latter holding by the Ninth Circuit is certainly consistent with the approach of the lower Court in the instant case.

Continuing, appellants suggest that federal case law indicates the propriety of just compensation as opposed to a remedy of invalidation. Appellants rely, however, on what can be characterized as public works type projects involving the physical appropriation of property rights. *Penn Central Transportation Co. v. City of New York, supra,* at p. 128. For example in *Hurley v. Kincaid* (1932) 285 U.S. 95, suit was brought by downstream owners to enjoin a flood control project on the ground that it would flood their property. This Court rejected an injunction but did conclude that construction of the project could require compensation for flooding. Not only does *Hurley* obviously fall into the physical invasion category, but also it is clear that where the government has determined to undertake a project an injunction could frustrate the governmental purpose. In that instance the recognition of damages is nothing more than an implementation of Congressional intent. *Dugan v. Rank* (1963) 372 U.S. 609 involved similar circumstances as does *U.S. v. Gerlach Live Stock Co.* (1950) 339 U.S. 725.

These cases have no application to judicial review of the validity of a zoning ordinance intended to regulate private property.

Two other cases sometimes cited for the proposition that federal courts award compensation are also inapplicable. In *Benenson v. United States* (Ct. of Claims 1977)

548 F.2d 939, the Court found that the sum total of governmental action aimed at preventing demolition of the Willard Hotel in Washington, D.C. so as to facilitate acquisition constituted a taking. There the government's intent almost from the beginning was to bring the hotel site into public ownership. Efforts by the owners to alter the building in any manner were prevented in order to preserve the government's options. Similarly in *Drake's Bay Land Company v. United States* (Ct. of Claims 1970) 424 F.2d 574, the Court held that Congress *intended* for the United States to acquire an inchoate interest in the property at the time legislation was enacted authorizing the Point Reyes National Seashore. P.L. 87-657. The later failure of governmental officials to expeditiously acquire the property coupled with their acts blocking development were held to justify an award of compensation.

In the instant case the owners have not been rejected in efforts to develop the property since they have never even asked the city for any approvals. The eminent domain action filed by the city was abandoned according to authorized statutory procedures. Therefore, the zoning ordinance stands on its own feet as an action which cannot be equated with any intent to acquire the property. *Benenson* and *Drake's Bay* fall into the category of activities which were so egregious as to cause the courts to recognize the intent of the government to acquire the property and simply implement that intent by judicial decree.[14]

[14]California law provides compensation to land owners in these circumstances also. In *Peacock v. County of Sacramento* (1969) 271 Cal.App.2d 845, the county had refused to permit any development of the land in question while assuring the owner that the restrictions were of no consequence because the county intended to acquire the property for an airport. When, after denying the owner any use of his property for five years, the county renounced its intent to acquire the land, the Court concluded that due to the "exceptional and extraordinary circumstances" the property had been taken by inverse condemnation. *Id.* at p. 854. See *HFH Ltd. v. Superior Court,* 15 Cal.3d 508, 517 fn. 14. This remedy of monetary damages through inverse condemnation for particularly egregious conduct by public agencies in anticipation of acquisition is not affected by the decision of the California Supreme Court in the instant case. Rather, the Court held that under the facts as alleged the city's activities did not constitute inequitable precondemnation actions leading to inverse condemnation. This is an eminently correct conclusion where the city's planning process was open and public and action was taken in a timely manner. In arguably more difficult circumstances courts have refused to award money damages. *City of Chicago v. Loitz* (Ill. 1975) 329 N.E.2d 208, *Macmor Mortgage Corporation v. Exchange National Bank of Chicago* (Ill. 1975) 332 N.E.2d 740. If the city's activities were deemed to constitute inverse condemnation no public agency would be able to undertake public discussion and consideration of possible acquisition. This could lead to the conspiratorial, backroom, non-public activities in anticipation of acquisition which did not occur in this case but which appellants imply from their assertions.

Likewise, appellants' attempt to portray various state cases as indicating chaos in this area of the law is thoroughly misleading. For example, some of the cases cited involve physical occupation of private property, a circumstance that has nothing to do with land use regulation. See *Brazil v. City of Auburn* (Wash. 1979) 598 P.2d 1 (Juris. St., p. 21). Other cases involve instances where the challenged regulation was actually upheld without any requirement of compensation. For example, in *Moviematic Inc. v. Bd. of County Com'rs.* (Fla. 1977) 349 S.2d 667, a restriction authorizing one single family residence per five acre parcel, an even more restrictive limitation than is involved in the instant case, was upheld without any requirement of compensation. See also *Village of Willoughby Hills v. Corrigan* (Ohio 1972) 278 N.E.2d 658 (height limit in the vicinity of an airport upheld without requirement of compensation). Other of the state decisions

cited by appellants are so peculiar on their facts as to be irrelevant to the instant cause.[15] For example in *Askew v. Gables-By-The-Sea, Inc.* (Fla. 1976) 333 S.2d 56, an earlier judgment entered between the State and private owners indicated that the right to fill and dredge the underwater lands involved had become a vested right. Therefore, *Askew* deals with a situation where a vested right (akin to an existing use) is totally frustrated. This has no relevance to governmental regulation of unimproved land. Perhaps most significantly, none of the cases cited held that compensation was due to affected private owners from the mere enactment of a zoning regulation.

Appellants' assertion that open space which would remain after property is developed is somehow a public use requiring compensation is thoroughly erroneous. (Juris. St., pp. 11 fn. 6, 16) As long ago as 1926, in *Gorieb v. Fox* (1926) 274 U.S. 603 (upholding building setback requirements without any provision for compensation), this Court stated:

[15]Likewise appellants' discussion of the *Keystone* cases from New York is inapposite. (Juris St. p. 21.) The basic decision in the Keystone Associates litigation was *Keystone Associates v. Moerdler* (1966) 278 N.Y.S.2d 185. There the Court invalidated New York's attempt to preserve a building occupied for 83 years by the Metropolitan Opera Association. The legislation created a private corporation and vested it with the power to condemn the particular property and appropriate it for the use as an auditorium. The Court struck down the statute and viewed it as an exercise of the power of eminent domain. *Id.* p. 188. To equate that situation with the instant case is inappropriate since in *Keystone* a statute was enacted aimed at a particular piece of property with the sole purpose of acquisition. The Court even concluded that the statute was not intended to protect public health, safety and welfare as those terms are commonly understood. *Id.* p. 188. In the instant case the zoning ordinance was part of a comprehensive planning process and applied to many parcels of land in the area.

> "It is hard to see any controlling difference between regulations which require the lot-owner to leave open areas at the sides and rear of his house and limit the extent of his use of the space above his lot and regulation which requires him to set his building a reasonable distance back from the street. Each interferes in the same way, if not to the same extent, with the owner's general right of dominion over his property. All rest for their justification upon the same reasons which have arisen in recent times as a result of the great increase and concentration of population in urban communities and the vast changes in the extent and complexities of the problems of modern city life. *Id.* p. 608.

In a more contemporary circumstance the validity of regulations which result in open space has been well explained. In *Friedman v. City of Fairfax* (1978) 81 Cal.App.3d 667, the California Court of Appeal held:

> "While a conceived objective of preserving a scenic, historical and singularly desirable open-space resource may result in confering a public *benefit,* such an otherwise valid purpose and attendant result is not the equivalent of a public *use* requiring compensation. So long as a rational basis exists for a zoning decision, the purpose or motive of the ordaining body becomes irrelevant to any inquiry into its reasonableness." *Id.* p. 677 (emphasis by the Court).

Nor does the fact that the power of eminent domain may be exercised by a city for the purpose of acquiring open space have the effect of rendering any open-space which is the result of regulation *ipso facto* a public use requiring compensation. Were this to be the law, then even the most mundane requirements for dedication (street purposes, for

example) as a part of a subdivision approval would result in comparable takings. Such is not the law. See, e.g., *Ayres v. City Council of Los Angeles* (1949) 34 Cal.2d 31.

CONCLUSION

For the reasons stated herein, this appeal should be either dismissed or the judgment affirmed.

Respectfully submitted

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